IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1569 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

AHMEDABAD MUNICIPAL CORPN.

Versus

PRAKASH CONSTUCTION CO.

Appearance:
1. First Appeal No. 1569 of 1983
MR MG NAGARKAR for appellant
MR KG SUKHWANI for Respondent

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 19/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The present appeal preferred by the Ahmedabad Municipal Corporation is directed against the judgment and decree dated 4th November 1982 passed by the learned City Civil Judge, Ahmedabad, in Civil Suit No.2446 of 1979 decreeing the suit in favour of the respondent (original plaintiff) for Rs.55,314.80 ps. along with proportionate cost and interest at the rate of 6% per annum from the date of the suit till realisation. The plaintiff filed the suit to recover Rs.1,38,260/- from the appellant defendant Corporation alleging that the Corporation wrongly terminated the contract which had taken place between the parties and thereunder the plaintiff firm had agreed to carry out the construction work of extension of new sub-Urban Pumping Station. Out of the sum of Rs.1,38,260/-, the plaintiff claimed a sum of Rs.1,10,600/- by way of damages as loss of profit and Rs.27,600/- the amount of security deposit.

2. The case of the plaintiff, as narrated in the plaint, can be summarised as under:

It is the case of the plaintiff that it is a duly registered partnership firm carrying on business as Engineers and Contractors. A Tender was invited for construction of extension of new Sub-Urban Pumping Station, Jamalpur Station, Jamalpur at Ahmedabad. The plaintiff filled in the Tender and it being the lowest, the same was accepted by the defendant Corporation. The plaintiff was communicated about the acceptance of the Tender by letter dated 1st December 1976. The plaintiff was thereafter called upon to furnish security deposit of Rs.27,660/-. The plaintiff furnished security deposit in the shape of Bank Guarantee and thereafter the plaintiff made all arrangements for proceeding with the work. However, the defendant Corporation had a second thought and was not interested in carrying out the said work and therefore, asked the plaintiff not to proceed with the work and ultimately, terminated the contract by writing letter dated 28th April 1977. It is alleged by the plaintiff that the said termination order issued by the Deputy City Engineer, on behalf of the Corporation is against the terms and conditions of the contract and therefore, the plaintiff is entitled to recover damages by way of loss of profit. It is further the case of the plaintiff that the defendant Corporation had not returned the Bank Guarantee and therefore, the suit was filed claiming the reliefs as stated hereinabove.

3. By filing Written Statement at Exh.15, the

defendant Corporation resisted the suit. It is the case of the defendant that the Corporation passed a Resolution No.381 dated 23.7.1976 whereunder sanction was granted for the extension of the Sub-Urban Pumping Station. The defendant Corporation thereupon invited Tenders and the plaintiff's tender being the lowest, was accepted by the Standing Committee by Resolution No.1921 dated 21.11.1976. It is further the case of the defendant Corporation that the Corporation even though intimating the acceptance of the offer, it is not ever the case that by the said letter, the plaintiff was asked to furnish the security deposit and also to execute the contract of the above work, but the plaintiff has furnished the security deposit, however, no written contract had taken place. According to the defendant, the plaintiff was required to execute agreement in writing as per the Rules of the Corporation, but such an agreement did not take place between the parties. It is also pointed out that no work order was issued to the plaintiff. Thus, as per the case of the defendant, unless a written agreement takes place between the parties, it cannot be said that there had taken place a concluded contract and therefore, the plaintiff is not entitled to recover any amount for not giving the aforesaid work to the plaintiff. It is pointed out by the defendant that the design of the extension work was not satisfactorily finalised and, therefore, the Standing Committee by Resolution No.378 dated 11.5.1977, the proposal for construction of the said project was dropped and the plaintiff was informed that it would be refunded the Earnest Money and the security deposit papers. Even though the plaintiff was asked to take away the security deposit papers and the Earnest Money, by letter dated 20.9.1977, the plaintiff had not taken any steps. The defendant, therefore, prayed for dismissal of the suit.

4. On the basis of the pleadings between the parties, the learned trial Judge framed the Issues at Exh.18.

The plaintiff firm has examined one of its partners, Mansukhlal vide Exh.21 and also placed reliance on documents produced vide List Exh.17 and 37. The defendant Corporation has not led any oral evidence but has relied upon documentary evidence produced along with Leave to Defend application at Exh.10.

After appreciating the oral as well as documentary evidence, the learned trial Judge held that the plaintiff has proved that there took place a concluded contract between the plaintiff and the

defendant for the extension of a New Sub-Urban Pumping Station, at Jamalpur, at Ahmedabad. It was also held that the plaintiff proved that the defendant has illegally terminated the contract even though the plaintiff was ready and willing to perform his part of the contract. With regard to the claim of damages put forth by the plaintiff, the learned trial Judge held that the plaintiff is entitled to Rs.55,314.80 ps. against the claim of Rs.1,10,600/-. The learned trial Judge, however, negatived the claim of the plaintiff with regard to the refund of security deposit amount of Rs.27,660/-. The learned trial Judge accordingly passed a decree for a sum of Rs.55,314.80 ps. in favour of the plaintiff. Hence the present appeal.

5. We have heard learned Counsel Mr.Nagarkar appearing for the appellant Corporation and Mr.Sukhwani for the respondent. We have also gone through the evidence on record. Mr.Nagarkar for the appellant submitted that the trial Court has committed an error in holding that there was a concluded contract between the parties. He further submitted that the trial Court ought to have held that the defendant has failed to prove the loss of profit resulted to him as a result of alleged breach of contract. Finally, it was submitted that in absence of any proof, the trial Court could not have held that the plaintiff would have earned profit at the rate of 10%. Mr.Sukhwani appearing for the respondents, on the other hand, supported the judgment of the trial Court in toto.

6. Before we appreciate the contentions advanced before us, we may mention certain undisputed facts between the parties. It is not in dispute that the defendant Corporation, through Additional City Engineer, invited Tender for construction of extension of New Sub-Urban Pumping Station at Jamalpur, at Ahmedabad. It is also not in dispute that the plaintiff filled in its Tender and the same was accepted by the Standing Committee vide its Resolution o.1921 dated 21.11.1976 and the plaintiff was communicated regarding the decision vide Exh.25. It is also an admitted position that the plaintiff firm furnished the security deposit in the form of Bank Guarantee for Rs.27,660/- vide Exh.26 exhibited by the Ahmedabad District Co-operative Bank Ltd.

7. The only controversy between the parties is regarding the execution of regular agreement for carrying out the work. It is the case of the defendant Corporation that the plaintiff firm had not executed a regular agreement and therefore, there has not taken

place any concluded contract. However, it is the case of the plaintiff that a contract is executed with the Corporation. The plaintiff in that connection has examined its partner, Mansukhlal, Plaintiff's Witness No.1 at Exh.21. In his examination in chief, he has stated that before demarcating the site, the Corporation executed a contract on a Stamp Paper, however, it retained the original agreement. He has stated that copy of this agreement is also not provided to him. This witness is cross examined on this point at length whereby his assertion is challenged. He has specifically denied the suggestion that no written agreement was taken place between the plaintiff firm and the Corporation. The defendant Corporation could have led specific evidence rebutting the claim of the plaintiff regarding execution of the documents. The learned trial Judge, in his judgment, has observed that the case was adjourned twice for enabling the defendant Corporation to lead evidence, but no witness was kept present on 19th October 1982, the date fixed for recording the defendant's evidence and therefore, the right of the defendant to lead oral evidence was closed by passing specific order Exh.46. Thereafter the matter was adjourned for arguments on 20.10.1982. Thereupon, not only the plaintiff's Advocate advanced arguments but also the defendant's Advocate advanced arguments and the matter was adjourned for judgment on 25.10.1982. On 25.10.1982, the defendant's Advocate gave an application Exh.47 to permit the defendant to examine one officer alleging that this officer was not available and therefore, he was not examined earlier. This request was opposed by the plaintiff. But even then in order to give one more opportunity to the defendant Corporation, the request was granted subject to payment of cost of Rs.250/- and the suit was adjourned to 2.11.1982 for recording evidence of this witness. On 2.11.1982, the witness was not kept present and the amount of cost was not deposited and a request was made that the suit be adjourned after Diwali Vacation. This request, being unjust, was rejected. Thus, even though the defendant was given additional chance to examine a witness even after the arguments were heard and the matter was adjourned for judgment, the defendant Corporation has not availed of the opportunity. Thus, there is no positive evidence led by the defendant to show that an agreement had taken place in respect of the suit Tender.

8. The aforesaid observations of the trial Court are sufficient for us to hold that the evidence of the plaintiff with regard to execution of the document has gone unchallenged and there is no reason to disbelieve

the word of the plaintiff firm's partner Mansukhlal on this point. Accordingly, we conclude that an agreement was executed by the parties.

At this stage, it is necessary to refer to Exh.26, which is the copy of the Guarantee Deed executed by the Ahmedabad District Co-operative Bank Ltd. The relevant portion of Exh.26 reads as under:

> "In consideration of the Municipal Corporation of the City of Ahmedabad (hereinafter referred to as the Corporation) having agreed to exempt Prakash Construction Co. (hereinafter referred to as "The said Contractor") from the demand of security deposit in cash for the due fulfillment by the said Contractor of the terms and conditions of the agreement made between the Corporation and the said Contractor on 18.12.1976 for constructing extension to New Sub-Urban Pumping Station, Jamalpur, Ahmedabad (hereinafter referred to as "The said agreement") on production of a Bank Guarantee for rs.27,660/(Rupees Twenty seven thousand six hundred sixty only), we, Ahmedabad District Co-operative Bank Ltd. (hereinafter referred to as "The Bank" do hereby undertake to pay to the Corporation an amount not exceeding Rs.27,660/- (Rupees Twenty seven thousand six hundred sixty only) on demand from the Corporation".

The portion referred to above clearly mentions about the agreement between the defendant Corporation and the plaintiff on 18th December 1976. It is, therefore, not possible for us to believe that the Bank would mention about execution of agreement unless the agreement was executed between the parties. The learned trial Judge has observed in that regard that it is not possible to believe that, at this stage, the plaintiff was interested in making false representation to the Bank. At that time, the plaintiff could not have visualised that this contract work was to be arbitrarily terminated by the defendant Corporation during April 1977. Needless to say that we agree with the reasoning of the trial Judge. In our opinion, mentioning about execution of the agreement in the Deed of Bank Guarantee will leave no manner of doubt that a regular agreement was executed between the parties. Therefore, it is futile to contend that no agreement had taken place between the parties as asserted by the learned Counsel appearing for the appellant Corporation. In view of the fact that the Tender of the

plaintiff was accepted and that the plaintiff had given the deposit by furnishing Bank Guarantee and had also executed the contract and the contract was executed between the parties for commencement of the work and in compliance of the same, the plaintiff had in fact started preliminary preparation for starting the work, we are of the view that a contract between the parties is concluded. However, the defendant Corporation had a second thought of the matter. From the correspondence on record, it appears that the plaintiff firm was ready and willing to carry out the work but the defendant Corporation was not willing to get the work executed and had in fact informed the plaintiff that his Tender was cancelled. In fact, there is no dispute between the parties that the defendant Corporation once having accepted the Tender of the plaintiff by passing Resolution was not willing to get the work constructed from the plaintiff firm and the defendant Corporation, through its Deputy City Engineer had informed the plaintiff to get returned the papers pertaining to security deposit. According to the defendant, the design for the extension work was not satisfactorily finalised and, therefore, the Standing Committee passed the Resolution No.378 dated 11.5.1977 for dropping of the project and thereupon the plaintiff was informed vide letter dated 28th September 1977 to take away the Earnest Money and the security deposit papers. In this view of the matter, we are of the opinion that even though the plaintiff was willing to carry out the construction work as per the Tender, the defendant Corporation was not prepared to carry on with the same and therefore, the Corporation has unilaterally terminated the contract.

9. Even though in the instant case the plaintiff has claimed damages of of Rs.1,10,000/- for arbitrary and illegal termination of the suit contract by the defendant Corporation, the Court has awarded Rs.55,314.80 ps. by way of damages by holding that the plaintiff would have earned at least 10% of profit if the defendant Corporation had not prevented the plaintiff from carrying out the construction. The main reasons given for arriving at the said conclusion is to the effect that the defendant Corporation had not permitted the plaintiff firm to carry out the construction and therefore, the plaintiff would be entitled to such amount which in the opinion of the Court, would have been the profit of the plaintiff if the plaintiff had been permitted to carry out the work by the defendant Corporation. As per the say of the plaintiff, it is the normal practice to keep 15 to 20% when they fill in the Tender. It is also stated by the plaintiff that the defendant Corporation as

well as the Public Works Department of the Government while fixing the amount of Tender, estimate contractor's profit at 10 to 15%. According to the plaintiff, the Income Tax authorities while assessing contractor's profit, assess the same at 15% on the Tender price. Since the aforesaid version of the plaintiff had not been challenged by the defendant, the trial Court found it reasonable to hold that the plaintiff would have earned at least 10% of the profit if the defendant Corporation had not arbitrarily prevented the plaintiff from carrying out the construction. We are in total agreement with the said reasonings as nothing has been pointed out by the learned Counsel for the appellant to take out a different view in the matter. We are of the opinion that the learned trial Judge was justified in holding that the plaintiff is entitled to Rs.55,314.80 ps. by way of damages from the defendant Corporation against the claim of Rs.1,10,000/-.

10. Thus, considering the facts and circumstances of the case and taking overall view of the matter, we are clearly of the opinion that the learned trial Judge was justified in passing the decree for Rs.55,314.80 ps. along with proportionate cost and interest at the rate of 6% per annum which does not warrant any interference in the matter. There being no substance in this appeal, it is dismissed. Considering the facts and circumstances of the case, there will be no order as to costs.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)
Sreeram.